

ISAAC S. SMITH, OF SYRACUSE, NEW YORK.

[To accompany bill H. R. No. 713.]

JANUARY 16, 1857.

Mr. WADE, from the Committee on Commerce, made the following

REPORT.

The Committee on Commerce, to whom was referred the memorial of Isaac S. Smith, of Syracuse, New York, make the following report :

The petitioner in this case claims compensation for losses sustained by him, by reason of the termination on the part of the government of a contract made by him with the United States to construct a light-house on what was then, and still is, known as the "Horse-shoe reef," in the Niagara river, near Fort Erie, opposite Buffalo, in the State of New York.

The site selected for this structure was one of the most exposed on the lake waters, as well from the prevalence of the westerly gales as from ice and a strong current. The light-house was to be constructed on a plan devised by Mr. Smith and submitted to the "light-house board," and approved by that board. This plan was novel, and based on the hypothesis that the "Horse-shoe reef" was composed of solid rock situated about seven and a half feet below the surface of the water in the river. The plan of this house was such, that, if it should prove of sufficient strength, it was supposed would greatly facilitate the construction of light-houses in very exposed situations, where rock formation existed at such depth of water as would admit of practical excavation of the rock.

The whole price to be paid to Mr. Smith for the light-house was fixed at forty thousand dollars; but in view of the novelty of the plan, and to secure the government against any insufficiency of the structure to resist the force of the winds, the currents of the river, and the ice, and all these forces combined, the government stipulated to pay Smith, on the completion of the house, "to the satisfaction of such person as should be appointed by the Secretary of the Treasury to oversee and inspect the same," the sum of twenty thousand dollars, and "a further sum of twenty thousand dollars within twelve months afterwards, if, in the mean time, the work should be found to have successfully withstood the effects of the ice, winds, and storms, but not otherwise; it being a part of this agreement that the first pay-

ment is to be in full discharge of this contract, if the work shall have received essential damage from the causes aforesaid, or exhibits any deficiency in its construction."

The light-house was not constructed by Smith on the plan proposed and accepted by the government. The reason for this was, not from any want of energy or skill in Smith in the effort to carry out the proposed plan, but from the fact that, after laboring with the utmost energy and skill, and at great expense, for the greater part of the season of 1852, in the endeavor to reach "the rock of which the reef was supposed to be composed," and after penetrating to the depth of 11½ feet into the substance of the reef, making about 19 feet below the surface of the water, no rock was found, but a composition of boulders, gravel, partially pulverized shells, and sand, only. This discovery was, of course, fatal to the plan proposed by Smith and approved by the department.

It is claimed on the part of the government that it relied alone on the representations of Smith as to the rocky character of the reef; but the committee are of the opinion that the government, through its engineers in charge of the public works at Buffalo, and the light-house board, who relied upon these engineers, were equally with Smith laboring under this fundamental error. The government, from the earliest period, has had one or more of the corps of topographical engineers stationed at Buffalo; and the shoals, promontories, currents, soundings, bars, and reefs there have all been designated on many government maps and charts of this harbor and its immediate vicinity.

It is a matter of public notoriety, of which all persons inhabiting the city of Buffalo and its vicinity, and at all acquainted with the shores of the Niagara river, that these shores, at a few feet below the surface, are composed of a compact blue limestone rock. The maps and charts of this harbor and its adjacent waters designate this shoal as "Horse-shoe reef." The popular and proper meaning of this word *reef* being "rock near the surface of the water," some of these maps, &c., designate the reef as "rocky," some as "rock"—all implying the universal understanding that the location of this light-house was a rock, situated a few feet below the surface of the water. Besides, the petitioner has exhibited the depositions taken by him *ex parte* of Michael Lyons, Albert Hosmer, James L. Barton, William A. Bird, (a surveyor connected with the boundary commission appointed by the treaty of Ghent, who made a survey and map of the "outlet of Lake Erie," and knew all the reefs in that vicinity, and among them the Horse-shoe reef,) John L. Kimberly, George Coit, and Sheldon Cady. Some of these gentlemen are seamen, some masters of vessels, some the owners of steam and sail vessels, and some of them practical engineers and surveyors; all of them intimately acquainted with the Niagara river and with the "Horse-shoe reef" for many years—some as many as 35 years, others from 15 to 25 years; and they all concur in stating that the universal reputation of "Horse-shoe reef" was that it was composed of solid rock, and that no intimation was ever heard to the contrary until so demonstrated by the excavations of the petitioner.

Among the foregoing witnesses is Sheldon Cady, and several other of the petitioner's workmen on the excavations on the reef for the foundation of the light-house. All these concur in the statement that during the whole of the season of 1852, while the wind and weather permitted working on the reef, they were engaged on that work, with as many other hands as could be profitably employed thereon. All the foregoing witnesses concur in stating they are severally acquainted with the petitioner, and that he is a person of abundant ability, skill, and energy to construct a *permanent* light-house on the "Horse-shoe reef." After the petitioner, by his excavations on the reef during the season of 1852, had discovered that there was no solid rock on the reef at any practical depth below the surface of the water, he, on the 23d of August, 1852, applied for and obtained from the Secretary of the Treasury an extension of the time, and also a modification of the plan of construction, as stated in the said application. This modified contract contained the terms of payment as above stated. It is on this modified contract that the present application for relief is based. The assent of the Secretary to the petitioner's proposal bears date the 28th of August, 1852, and concludes in these words: "If Mr. Smith concludes to progress with the work agreeably to the above, the *additional time he may require* will be granted." The committee are of opinion that, under this last contract, the petitioner was allowed such extended time to complete his contract as would be indicated by the use of reasonable diligence. He was bound to employ only such number of skillful and industrious mechanics and laborers as could be reasonably and conveniently engaged on the different kinds of work necessary to be performed in order to finish the job within a reasonable time, allowing for the natural difficulties necessarily incident to the construction of the work at a point so much exposed to the capricious influences of the winds and waves, and the insuperable obstructions of the inclement seasons of autumn, winter, and spring.

The evidence in the case satisfies the committee that the petitioner is not chargeable with negligence in the prosecution of the work after the time was extended as above stated. Indeed, the testimony of Captain Benham, the engineer in charge of this work, to the probity, diligence, and energy of the petitioner, is so strong and full, and, in the opinion of the committee, so just, that they extract it from his letter to the Secretary of the Treasury of August 27, 1852, as follows:

"I would only add, that I take great pleasure in giving my testimony to Mr. Smith's evident honesty of purpose in this matter; to the desire he has constantly shown to construct the work of the best materials, and in the strongest manner; and to his untiring industry and perseverance; all of which would lead me to recommend, should his plan be deemed feasible upon such a site as this one appears to be, any reasonable indulgence as to the extension of time that he may desire."

The letter of Captain Benham, from which the above is an extract, is that to which the last above cited letter of the Secretary of the Treasury, extending the time of the completion of the contract, is a reply. The letter of the Secretary of the Treasury, extending to Mr. Smith the time of performing his contract, was communicated to Mr.

Smith through Mr. Ketchum, the collector of the port of Buffalo, to whom Smith gave notice of his acceptance of the extended proposition on the 13th of September, 1852. In this letter, Smith, after accepting the terms of the extended proposition, says: "Unforeseen delays may arise, which would render it impossible, with the utmost diligence, to complete it in less than one year from the time limited in the contract," (referring undoubtedly to the original contract,) "say the 1st day of November, 1853." From the language of the Secretary of the Treasury, granting *such time as Smith might require* (which would, of course, mean a *reasonable time* in view of all circumstances,) it is *not* absolutely limited to a year from November 1, 1852. But circumstances might exist, and probably would exist, if Smith exercised upon the work reasonable energy and skill, without completing it, as to entitle him to even a longer extension of time. Indeed, these words of Smith do not necessarily import anything more than an *opinion* that the 1st of November, 1853, would be the length of time which he might require.

There is no pretence set up that Smith, after the extension of time, did not prosecute the work with his accustomed energy and skill. But he was not able to complete the work by the 1st of November, 1853. On the 20th of September, 1852, the acting Secretary of the Treasury wrote to Mr. Ketchum, the collector at Buffalo, that the department had accepted the proposition of Smith to have the time of performance extended to November 1st, 1853. But it should be recollected that the department, on the 28th of August, 1852, had already granted to Mr. Smith "such time as he might require;" and it does not seem to the committee that the government could equitably take from Smith the right to go forward with his contract, (he using reasonable diligence,) even after the hypothetical time (*viz*: 1st November, 1853) intimated in his reply to the department of September 13, 1852, had expired.

In reply to the acting Secretary's letter of the 20th September, 1852, Mr. Ketchum, on the 22d September, 1852, wrote that he had received the Secretary's letter of the 20th, *but, at the suggestion of Captain Benham, "should delay notifying Mr. Smith a few days, in order to give the department a few days to reconsider its decision, as it may be inclined to do, on receipt of Captain Benham's report, which he informs me he has forwarded."* On the 14th October, 1852, the Secretary of the Treasury answered Mr. Ketchum as follows: "Please return to the department the letter forwarded to you—the letter to Mr. Isaac S. Smith.—Thomas Corwin, Secretary," &c., &c.

To this short note Mr. Ketchum on the 18th October, 1852, replied, among other matters, as follows: "*Two letters have been forwarded to me, the contents of which I was directed to communicate to Mr. Smith—one dated August 28, 1852; the other September 20, 1852. As they are the only letters received by me, to which your instructions can apply, I have enclosed both of them. A copy of the one of the 28th August was furnished Mr. Smith; but I have not communicated the contents of that of the 20th of September to him, for reasons stated in my letter of the 22d September to the Fifth Auditor.*"

On the 27th October, 1852, Captain Benham sent the report to the

Secretary of the Treasury, alluded to by Mr. Ketchum in the above quoted letter of the 22d September, 1852. *This report* condemns Mr. Smith's plan in very decided terms, and intimates that, though he (Smith) might have believed he could have accomplished it, yet that this belief might be *only a hope that he should by some means* be able to complete it as specified.

It appears from Mr. Ketchum's letter to Mr. Corwin, of October 18th, 1852, that the Secretary of the Treasury had overlooked the letter of 28th August, 1852, from the acting Secretary, extending the time of performance of Smith's contract indefinitely, or, in his own words, granting him "such time as he might require;" this being, in legal effect, a "reasonable time." But at *this date* (October 18, 1852) the Secretary's second letter, extending the time of performance of the contract, was returned by Ketchum to the Secretary, without delivery or notice to Smith.

In this last report the plan is condemned in very pointed terms, and concludes as follows: "Yet his persevering determination to attempt to execute his contract, under so many unexpected and opposing circumstances, and against the adverse opinions of many, perhaps nearly all, other persons who have examined the subject, lead me to fear that the further prosecution of this work must result in a continued, and, perhaps, much greater pecuniary loss to the contractor; a loss that, *notwithstanding every precaution that may be taken by the officers of the Treasury Department, I have reason for thinking it not only possible, but probable even, that Congress will be called upon, and perhaps successfully so, to reimburse.*"

On the 13th May, 1853, *after the lapse of some seven months* from the date of Benham's report, the Secretary transmitted to Mr. Smith the report of the "committee on engineering," respecting his plan for constructing the light-house; which plan had been *previously adopted*, and the time of construction extended as above stated.

To the committee this course appears to have been in violation of the extended contract on the part of the government, and unjust to Mr. Smith. It is in proof that during the winter of 1852-'53 Mr. Smith was pushing on the work on the modified plan, in every part of it which would admit of prosecution during that season; and he was doing this with the consent of the government.

The eagerness and energy with which Smith was prosecuting his contract in October, 1852, was such as to attract the attention of Captain Benham. Nevertheless, the government, by its agents, knowing this fact, at the same time seem to have meditated a rejection of the plan, but neglected to inform Smith of that intention. This conduct of the government, not through design, but neglect, seems wholly inconsistent with the rights of the petitioner. But the government, even after this rejection of Smith's modified plan of construction, *did not notify him* of the termination of his contract. But again, on the 21st of January, 1854—a period of more than eight months—the light-house board, by Captain Hardcastle its secretary, issued instructions to Captain J. C. Woodruff "*to report again* upon the feasibility of Smith's plan of constructing the light-house, and to state the time which will be required for that purpose."

On the 1st of February, 1854, Captain Woodruff informed the department that he had called on the "*assistant*" for the requisite information. On the 17th April, 1854, by its chairman, the light-house board reported *again*, condemning the plan of Mr. Smith. On the 3d May, 1854, the light-house board, through Thornton A. Jenkins, its secretary, report to the Secretary of the Treasury that Smith had "failed to perform his contract, after the expiration of the extended period of one year granted to him by the department."

On the 8th May, 1854, P. G. Washington, for the Secretary of the Treasury, directed the secretary of the light-house board to notify Smith "that his contract for building the light-house had been annulled."

On the 12th May, 1854, Captain J. C. Woodruff, light-house inspector of the 10th district, wrote to Captain Hardcastle, the secretary of the light-house board, informing him that he had immediately communicated to Smith Mr. Washington's letter annulling Smith's contract for building the light-house. In this letter Captain Woodruff states: "*I have been aware that Mr. Smith has been engaged at various times during the intervals of labor on the reef in experiments to test the practicability of cutting out the stone for the footing of his shaft, excavation by drillings and blasting having failed during the last season of work on the reef. He has resumed work at the reef, clearing out the well, which had been filled by the action of the waves, with stone from the adjacent compartments of the crib. This operation has been nearly completed. He has his engine ready to transport to the crib for drilling or cutting out the stone.*"

"This statement seems to be called for from the nature of his reply to my letter, that the board may be advised from this office of the extent of his operations this season."

The above is a compendium of the voluminous correspondence in relation to the execution of the petitioner's contract to build a light-house on the Horse-shoe reef.

To the committee it seems very plain that, if the government intended to avail itself of the petitioner's non-performance of his contract in respect to *time*, both the law and even fair dealing demanded that it should have so informed Smith. The contract had been *expressly* extended as follows, viz: 1st. From August 23 to November 1, 1852. 2d. Taking the department's own construction, from November 1, 1852, to November 1, 1853, and from November 1, 1853, to May 12, 1854.

This implied extension is established satisfactorily to the committee, from the fact that the government's agent and inspector of this very building knew that Smith was making every reasonable effort after the 1st of November, 1853, to complete the building; yet no intimation was given that his contract would be summarily annulled in the spring, at the commencement of the only season in which labor in *erecting the edifice* could be performed.

In the opinion of the committee, there existed no reasonable ground for this last summary rescission of the contract on the part of the government. Smith, with what must be considered the consent of the government, had been permitted to go on with the attempted fulfilment of his contract, *after* the expiration of the *last extended time*,

viz: from the 1st of November, 1853, to the 12th of May, 1854—that is, through that part of the season in which it would be utterly impossible to do anything but collect and fashion the material for the edifice, but in which its erection would be a practical *impossibility*. This omission of the government to give Smith notice of the repudiation of the contract until the return of the season in which the erection of the building could, if ever, be accomplished, was legally (to say nothing of equity) equivalent to an extension of the time for the *then current season* for labor.

But if the government rests its case on the fact that it had become convinced that Smith's plan of the building was inadequate to answer the purposes for which it was designed, the reply is, Smith assumed that responsibility on himself when the structure should be completed—nay, that the government was satisfied of the *adequacy* of the plan, and, being thus satisfied, contracted for its construction on that plan. The petitioner was at all the expense of his attempt to build the light-house, through the willing assent given by the government to the petitioner's plan of building it.

But further, if the government, on such mature examination, *finally* annulled the contract on the ground of inadequacy of the petitioner's plan, then it is but reasonable and just that the government should have done one of two things—either to have permitted him to go on for a reasonable time after what it claims to have been the expiration of the last extension, or else to refund the expenses to which the petitioner had been put by this tardiness in coming to a right understanding of a matter so directly within the line of its duty and its constant employment. It further appears from the testimony of two of the witnesses, that the "*serrated bars*" of iron proposed in the modified contract were finished, or could have been finished *in one week* after the contract was finally annulled by the Secretary of the Treasury in the spring of 1854. From this testimony it also appears that the serrated bars, as well as the boiler iron and other materials, were of the very best quality of bar and boiler iron. From this state of facts, the committee are of opinion that, in a case identical with the present, between citizen and citizen, before a court and jury, the petitioner would be entitled to indemnity for his time, labor, and expenses, as well as for such actual losses as he may have *bona fide* sustained in the purchase and re-sale of the unused materials for the construction of the light-house.

It also appears from the accounts and vouchers of the petitioner exhibited to the committee, that his actual expenses for labor and materials furnished, after deducting for materials re-sold, amount to the sum of thirteen thousand five hundred and forty-three dollars and seventy-seven cents, (\$13,543 77,) exclusive of his own services during the period the work was in progress, from the 23d of July, 1851, to the time he was notified of the annulling of his contract by the government, on the 11th of May, 1854—a period of two years nine months and eighteen days. The petitioner estimates the value of his personal services at the rate of two thousand dollars per year for the time he was employed in this work. The committee deem this sum higher than it would be reasonable to allow, all the circumstances

considered, and have added to the above sum a compensation at the rate of \$1,500 per year, for the above period of two years nine months and eighteen days, amounting to the sum of four thousand two hundred dollars; making in the whole the sum of seventeen thousand seven hundred and forty-three dollars and seventy-seven cents, (17,743 77;) for the payment of which, the committee herewith report a bill and recommend its passage.